

DANIEL E. LUNGREN, Attorney General
of the State of California
JOEL S. PRIMES, Supervising
Deputy Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 324-5340

Attorneys for Complainant

BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation)	No. AC 93-11
Against:)	
)	<u>STIPULATION</u>
BERNARD JOSEPH ROSA, JR., CPA)	
P.O. Box 10527)	
South Lake Tahoe, CA 96158)	
)	
Certificate No. CPA 14669)	
)	
Respondent.)	

Respondent, BERNARD JOSEPH ROSA, JR., and the Board of
Accountancy of the State of California (hereinafter "Board")
through its counsel Supervising Deputy Attorney General Joel S.
Primes, do hereby enter into the following stipulation:

1. Respondent, Bernard Joseph Rosa, Jr., hereby
acknowledges receipt of Accusation No. AC-93-11, Statement to
Respondent and copies of the Notice of Defense form.

2. Respondent has fully discussed the charges and
allegations contained in said Accusation No. AC-93-11 on file

///

1 with the Board and respondent has been fully advised with regard
2 to his rights in this matter.

3 3. Respondent was heretofore issued License No. CPA
4 14669 authorizing him to practice accountancy in the State of
5 California. The certificate expired on or about November 1, 1990
6 because respondent failed to pay the renewal fee and failed to
7 present evidence of compliance with continuing education
8 regulations. Respondent's CPA certificate was renewed, effective
9 September 25, 1991 upon receipt of the renewal fee. However, the
10 respondent provided the Board with no evidence of compliance with
11 the continuing education regulations.

12 4. On or about October 28, 1992, an Accusation bearing
13 number AC-93-11 was filed by Carol Sigmann, Executive Director of
14 the Board.

15 5. Respondent is fully aware of the right to a hearing
16 on the charges and allegations contained in said Accusation No.
17 AC-93-11, his right to reconsideration, appeal and any and all
18 other rights which may be accorded pursuant to the California
19 Administrative Procedure Act and the laws of the State of
20 California.

21 6. Respondent hereby freely and voluntarily waives his
22 right to a hearing, reconsideration, appeal, and any and all
23 other rights which may be accorded by the California
24 Administrative Procedure Act and the laws of the State of
25 California with regard to Accusation No. AC-93-11.

26 7. The parties agree that the stipulation recited
27 herein shall be null and void and not binding upon the parties

1 unless approved by the Board. In the event the Board in its
2 discretion does not approve this settlement, this stipulation
3 then is withdrawn and shall be of no evidentiary value and shall
4 not be relied upon nor introduced in any disciplinary action by
5 either party hereto except that Respondent agrees that should the
6 Board reject this stipulation and if this case proceeds to
7 hearing, respondent will assert no claim that the Board was
8 prejudiced by its review and discussion of this stipulation or of
9 any records relating hereto.

10 8. This agreement is made for the purpose of settling
11 Accusation No. AC-93-11. The admissions made herein are for the
12 purpose of this proceeding and any subsequent proceeding between
13 the Board of Accountancy and Bernard Joseph Rosa, Jr. or any
14 action taken by or before any governmental body responsible for
15 licensing accountants.

16 9. Respondent Bernard Joseph Rosa, Jr. admits that he
17 is guilty of unprofessional conduct pursuant to violations of
18 Business and Professions Code section 5100 of the Code in
19 committing acts of misleading advertising, failure to comply with
20 continuing education requirements, breach of fiduciary
21 responsibility, fraud, dishonesty and gross negligence in the
22 practice of public accountancy as is more particularly set forth
23 hereinafter:

24 A.

25 MISLEADING ADVERTISING

26 On January 11, 1989, and on January 15, 1990,
27 respondent mailed to potential clients in the South Lake Tahoe

1 area letters in which he states that his firm "specializes" in
2 serving the total tax needs of businesses and in which he ensures
3 that his firm can generate tax savings through tax avoidance
4 strategies regarding the self-employment tax.

5 Respondent disseminated misleading information to the
6 South Lake Tahoe community via a letter dated January 11, 1989.
7 Respondent advertised his firm's ability to save clients
8 substantial taxes. Respondent claims that he can save taxpayers
9 who, for example, net \$45,000 a total of \$5,859 every year for a
10 one-time fraction of the savings.

11 In another letter dated March 10, 1989, respondent
12 describes how to implement an equipment leasing arrangement
13 between husband and wife that eliminates self-employment tax paid
14 by the sole proprietor. This tax-avoidance scheme violates
15 income tax law as is outlined herein.

16 B.

17 PRACTICE WITH AN EXPIRED CPA CERTIFICATE

18 Respondent's CPA license (Certificate No. CPA 14669)
19 expired on October 31, 1990. The certificate was not renewed
20 until September 25, 1991. Respondent engaged in a public
21 accounting practice during this eleven month period with an
22 expired permit in violation of Business and Professions Code
23 section 5050.

24 ///

25 ///

26 ///

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1 C.

2 FAILURE TO COMPLETE CONTINUING EDUCATION COURSES

3 Respondent failed to provide documentary evidence of
4 continuing education courses completed for the renewal periods
5 which ended on October 31, 1988 and 1990.

6 D.

7 KNOWING PREPARATION, PUBLICATION
8 AND DISSEMINATION OF
9 MATERIALLY MISLEADING FINANCIAL
10 STATEMENTS, REPORTS AND GROSS
11 NEGLIGENCE IN THE PRACTICE
12 OF PUBLIC ACCOUNTANCY:

13 STAFFORD TAX RETURNS

14 In January 1990 respondent sent out postcards to
15 truckers in which he advertised that he could save them
16 substantial taxes by using a strategy to eliminate
17 self-employment taxes. In February 1990 Mr. Stafford telephoned
18 respondent to obtain the information to lower taxes on his 1989
19 tax returns. Respondent informed Mr. Stafford that he would have
20 to pay a one-time fee of \$1,475.00 to use respondent's "self-
21 employment tax elimination strategy".

22 On March 5, 1990 respondent sent Mr. Stafford a letter
23 and portions of income tax returns for a new client for whom
24 respondent was able to save over \$7,000 in taxes compared to the
25 new client's prior CPA. Mr. Stafford engaged respondent to
26 prepare his 1989 Federal and California tax returns and to set up
27 the equipment leasing arrangement designed to circumvent the
self-employment tax. Respondent assured Mr. Stafford that this
procedure for avoiding self-employment tax had been audited by

1 the Internal Revenue Service (IRS) and was not challenged. Based
2 on these representations, Mr. Stafford utilized Respondent's tax
3 avoidance strategy and engaged him to prepare his 1989 tax
4 returns.

5 In 1990 Mr. Stafford's 1989 Federal return was audited
6 by the IRS. On June 13, 1991 the Staffords were sent a final
7 copy of 1989 IRS Income Tax Examination Changes, which provided
8 additional tax due in the amount of \$5,401 plus \$773 interest.
9 On June 12, 1992 Mr. Stafford was awarded \$2,255 in damages by
10 the El Dorado County Superior Court pursuant to a small claims
11 action he brought against respondent. The damages included
12 respondent's self-employment tax strategy fee of \$1,475, plus
13 penalties and legal costs totaling \$780.00. The judgment has not
14 been satisfied.

15 Mr. Stafford operates a trucking business in the form
16 of a sole proprietorship. Respondent counseled Mr. Stafford to
17 avoid paying taxes on the self-employment earnings as follows:

18 In March 1990 respondent told Mr. Stafford to sign over
19 the pink slip to his truck to his wife effective January 1989.
20 This was done to make it appear to have been a transfer of
21 ownership of the property as of the beginning of the 1989 taxable
22 year. Respondent also instructed Mr. Stafford to sign an
23 equipment lease agreement with his wife effective January 1,
24 1989. The plan was for Mr. Stafford to lease his truck from his
25 wife for an amount sufficient to eliminate or substantially
26 reduce his Schedule C net profit and thus avoid self-employment
27 tax.

1 Rent expenses purportedly paid by Mr. Stafford to his
2 wife would be reported on Schedule C. Rent received by
3 Mrs. Stafford would be reported as rental income on Schedule E:
4 Rental income is not subject to self-employment tax.

5 The IRS disregarded the transfer of property from
6 Mr. Stafford to his wife because there was no arm's-length
7 transaction. The rent expenses of \$38,050 appearing on Schedule
8 C and rent income of \$36,000 appearing on Schedule E of the
9 Stafford's 1989 Federal Tax Returns were thus disallowed.

10 ADDITIONAL TAX RETURNS

11 Respondent has counseled numerous clients to use the
12 'self employment tax elimination strategy'. In the proposed
13 arrangement there is no bona fide truck lease agreement between
14 husband and wife. Respondent's illegal scheme moves income that
15 would be subject to self-employment tax off Schedule C and onto
16 Schedule E where it is taxed only as ordinary income. This
17 scheme requires clients to fraudulently back-date an equipment
18 lease agreement and pink slip and execute a fraudulent truck
19 lease agreement between trucker-husband and wife. Respondent's
20 clients were advised and required to follow this back-dating of
21 the equipment lease and pink slip while fraudulently executing a
22 truck lease agreement to utilize the 'self employment tax
23 elimination strategy'.

24 DISCIPLINARY ORDER

25 IT IS HEREBY ORDERED that Certificate No. CPA 14669,
26 Certified Public Accountant issued to Bernard Joseph Rosa, Jr.,
27 is revoked; however, said revocation is stayed and respondent is

1 placed on probation for three years on the following terms and
2 conditions:

- 3 A. SUSPENSION. As part of probation, License No. 14669
4 issued to respondent Bernard Joseph Rosa, Jr. is
5 suspended for two months. During this period of
6 suspension respondent shall not engage in any
7 activities for which certification as a Certified
8 Public Accountant or Public Accountant is required.
- 9 B. OBEY ALL LAWS. Respondent shall obey all federal,
10 California, other states' and local laws, including
11 those rules relating to the practice of public
12 accountancy in California.
- 13 C. QUARTERLY REPORTS. Respondent, within 10 days of
14 completion of the quarter shall submit quarterly
15 written reports to the Board on a form obtained from
16 the Board.
- 17 D. APPEARANCE AT ADMINISTRATIVE COMMITTEE MEETINGS.
18 Respondent shall report to and make personal
19 appearances at meetings of the Administrative Committee
20 at the Board's notification, provided such notification
21 is accompanied in a timely manner.
- 22 E. SURVEILLANCE PROGRAM. Respondent shall cooperate fully
23 with the Board of Accountancy, and with any of its
24 agents or employees in their supervision and
25 investigation of his/her compliance with the terms and
26 conditions of this probation including the Board's
27 Probation Surveillance Compliance Program.
- 28 F. FURTHER INVESTIGATION. Respondent shall be subject to,
29 and shall permit, a practice investigation of the
30 respondent's professional practice. Such a practice
31 investigation shall be conducted by representatives of
32 the Board whenever designated by the Administrative
33 Committee, provided notification to respondent of such
34 an investigation is accomplished in a timely manner.
- 35 G. COMPLY WITH ALL BOARD ORDERS. Respondent shall comply
36 with all final orders resulting from citations issued
37 by the Board of Accountancy.
- 38 H. TOLLING FOR OUT-OF-STATE PRACTICE OR RESIDENCE. In the
39 event respondent should leave California to reside or
40 practice outside this State, respondent must notify the
41 Board in writing of the dates of departure and return.
42 Periods of non-California residency or practice outside
43 the State shall not apply to reduction of the
44 probationary period.

1 I. COMPLETION OF PROBATION TERMS. In the event the
2 respondent fails to satisfactorily complete any
3 provision of the order of probation, which failure
4 results in the cessation of practice, all other
5 provisions of probation other than the quarterly report
6 requirements, examination requirements, education
7 requirements, and Administrative Committee appearances,
8 shall be held in abeyance until respondent is permitted
9 to resume practice. All provisions of probation shall
10 recommence on the effective date of resumption of
11 practice. Periods of cessation of practice will not
12 apply to the reduction of the probationary period.

13 J. VIOLATION OF PROBATION. If respondent violates
14 probation in any respect, the Board, after giving
15 respondent notice and opportunity to be heard, may
16 revoke probation and carry out the disciplinary order
17 which was stayed. If an accusation or a petition to
18 revoke probation is filed against respondent during
19 probation, the Board shall have continuing jurisdiction
20 until the matter is final, and the period of probation
21 shall be extended until the matter is final.

22 K. ETHICS COURSE AND EXAMINATION. Respondent shall take
23 and pass a Board approved ethics course and
24 examination. The exam shall be passed prior to
25 December 1, 1994.

26 If respondent fails to pass said examination within the
27 time period provided or within two attempts, respondent
shall so notify the Board and shall cease practice
until respondent takes and successfully passes said
exam, has submitted proof of same to the Board, and has
been notified by the Board that he/she may resume
practice. Failure to pass the required examination no
later than 100 days prior to the termination of
probation shall constitute a violation of probation.

28 L. REIMBURSE THE BOARD FOR INVESTIGATION & PROSECUTION
29 COSTS. Respondent shall reimburse the Board \$5,000 for
30 its investigation and prosecution costs. The payment
31 shall be made in thirty (30) equal monthly
32 installments, the first installment to commence in
33 thirty (30) days of the effective date of this Board
34 decision.

35 M. LICENSE RESTORED. Upon successful completion of
36 probation, respondent's license will be fully restored.

37 N. CPE COURSES. Respondent shall take and complete 80
hours of CPE courses as directed by the Administrative
Committee, to be completed by October 31, 1994. These
courses are in addition to the continuing education
hours required for license renewal.

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CONTINGENCY

This stipulation shall be subject to the approval of the Board. If the Board fails to adopt this stipulation as its Order, the stipulation shall be of no force or effect for either party, nor shall it be mentioned or referred to in any legal action between the parties.

ACCEPTANCE

I have read the above Stipulated Settlement and Disciplinary Order, understand their terms, and agree to be bound thereby.

DATED: 12.23.93

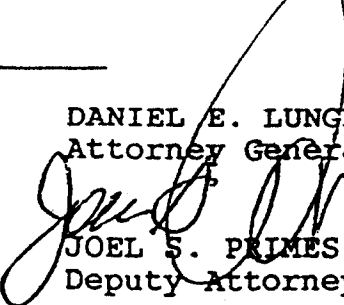


Bernard Joseph Rosa, Jr.
Certified No. CPA 14669
Certified Public Accountant

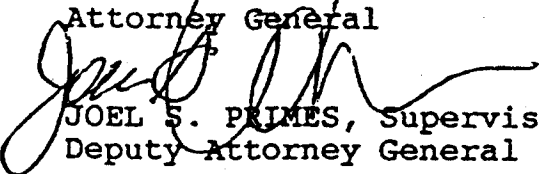
ENDORSEMENT

The attached stipulation is hereby respectfully submitted for the consideration of the Board.

DATED: Jan. 26, 1994



DANIEL E. LUNGREN
Attorney General



JOEL S. PRIMES, Supervising
Deputy Attorney General

Attorneys for Complainant

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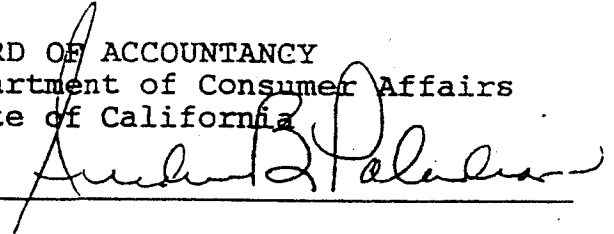
DECISION AND ORDER

The foregoing is adopted as the Decision of the Board
of Accountancy in this matter, and shall become effective on the
24TH day of MARCH, 1994.

IT IS SO ORDERED THIS 24TH day of MARCH
1994.

BOARD OF ACCOUNTANCY
Department of Consumer Affairs
State of California

BY



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of the State of California
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11 In the Matter of the Accusation) No. AC-93-11
Against:)
12) ACCUSATION
BERNARD JOSEPH ROSA, JR., CPA)
13 P.O. Box 10527)
South Lake Tahoe, CA 96158)
14)
15 Certificate No. CPA 14669)
16 Respondent.)
17

18 Carol Sigmann, the complainant herein, alleges as
19 follows:

20 1. She is the Executive Officer of the Board of
21 Accountancy of the State of California (hereinafter "Board") and
22 makes and files this accusation in her official capacity as such
23 and not otherwise.

24 2. On or about June 20, 1969, respondent Bernard
25 Joseph Rosa, Jr. (hereinafter "respondent") was issued
26 certificate number CPA 14669 to practice accountancy under the
27 laws of the State of California. The certificate expired on or

1 about November 1, 1990 because respondent failed to pay the
2 renewal fee and failed to present evidence of compliance with
3 continuing education regulations. Respondent's CPA certificate
4 was renewed, effective September 25, 1991 upon receipt of the
5 renewal fee. However, the respondent provided the Board with no
6 evidence of compliance with the continuing education regulations.

7 3. Section 118, subdivision (b), of the Business and
8 Professions Code (hereinafter "the Code") provides, in pertinent
9 part, that the expiration of a license issued by a board shall
10 not, during any period in which it may be renewed, restored,
11 reissued or reinstated, deprive the board of its authority to
12 institute or continue a disciplinary proceeding against the
13 licensee upon any ground provided by law or to enter an order
14 suspending or revoking a license or otherwise taking disciplinary
15 action against the licensee under any such grounds.

16 4. Section 5100 of the Code provides that a
17 certificate may be disciplined for unprofessional conduct which
18 includes, but is not limited to, the grounds set forth in said
19 section.

20 5. Section 5100, subdivision (h), of the Code provides
21 that fiscal dishonesty or breach of fiduciary responsibility of
22 any kind constitutes unprofessional conduct.

23 6. Section 5100, subdivision (c), of the Code
24 provides, in pertinent part, that dishonesty, fraud or gross
25 negligence in the practice of public accountancy constitutes
26 unprofessional conduct.

27 ///

1 7. Section 5100, subdivision (i), provides that
2 knowing preparation, publication or dissemination of false,
3 fraudulent, or materially misleading financial statements;
4 reports, or information constitutes unprofessional conduct.

5 8. Business and Professions Code section 5050
6 provides:

7 "No person shall engage in the practice of public
8 accountancy in this State unless such person is the holder
9 of a valid permit to practice public accountancy issued by
10 the board; provided, however, that nothing in this chapter
11 shall prohibit a certified public accountant or a public
12 accountant of another state, or any accountant of a foreign
country lawfully practicing therein, from temporarily
practicing in this State on professional business
incident to his regular practice in another state or
country."

13 9. Business and Professions Code section 5051
14 provides:

15 "Except as provided in Sections 5052, 5053, and 5054, a
16 person shall be deemed to be engaged in the practice of
public accountancy within the meaning and intent of this
chapter if he or she does any of the following:

17 "(a) . . . Holds himself or herself out to the public in
18 any manner as one skilled in the knowledge, science and
19 practice of accounting, and as qualified and ready to render
professional service therein as a public accountant for
compensation.

20 "(b) Maintains an office for the transaction of business
21 as a public accountant.

22 "(c) Offers to prospective clients to perform for
23 compensation, or who does perform on behalf of clients for
24 compensation, professional services that involve or require
an audit, examination, verification, investigation,
certification, presentation, or review, of financial
transactions and accounting records.

25 "(d) Prepares or certifies for clients reports on audits
26 or examinations of books or records of account, balance
27 sheets, and other financial, accounting and related
schedules, exhibits, statements, or reports which are to be
used for publication or for the purpose of obtaining credit
or for filing with a court of law or with any governmental

agency, or for any other purpose.

"(e) In general or as an incident to that work renders professional services to clients for compensation in any or all matters relating to accounting procedure and to the recording, presentation, or certification of financial information or data.

"(f) Keeps books, makes trial balances, or prepares statements, ~~makes audits, or prepares reports, all as a part of bookkeeping operations for clients.~~

"(g) Prepares or signs as the tax preparer, tax returns for clients.

"(h) Prepares personal financial or investment plans or provides to clients products or services of others in implementation of personal financial or investment plans.

"(i) Provides management consulting services to clients.

"The activities set forth in subdivisions (f) to (i), inclusive, are 'public accountancy' only when performed by a certified public accountant or public accountant, as defined in this chapter.

"A person is not engaged in the practice of public accountancy if the only services he or she engages in are those defined by subdivisions (f) to (i), inclusive, and he or she does not hold himself or herself out, solicit, or advertise for clients using the certified public accountant or public accountant designation. A person is not holding himself or herself out, soliciting or advertising for clients within the meaning of this section solely by reason of displaying a CPA or PA certificate in his or her office or identifying himself or herself as a CPA or PA on other than signs, advertisements, letterhead, business cards, publications directed to clients or potential clients, or financial or tax documents of a client."

10. Business and Professions Code section 5055

provides:

"Any person who has received from the board a certificate of certified public accountant and holds a valid permit to practice under the provisions of this chapter shall be ~~styled and known as a 'certified public accountant' and may~~ also use the abbreviation 'C.P.A.' No other person, except a partnership registered under Sections 5072 and 5073, shall assume or use that title, designation, or abbreviation or any other title, designation, sign, card or device tending to indicate that the person using it is a certified public accountant."

1 11. California Code of Regulations, Title 16, Article
2 9, Section 63 provides:

3 "A certified public accountant or a public accountant
4 shall not advertise in any manner which is false,
5 fraudulent, or misleading in violation of Section 17500 of
6 the Business and Professions Code."

7 12. California Code of Regulations, Title 16, Article
8 12, Section 87(a) provides:

9 "(a) 80 Hours.

10 "A licensee shall not engage in public practice as
11 defined in Business and Professions Code Section 5051 or any
12 activities referred to in Rule 5, in California, unless
13 during the two-year period immediately preceding permit
14 renewal the licensee has completed at least 80 hours of
15 qualifying continuing education and submitted the statement
16 required by Section 89. No carryover is permitted from one
17 two-year period to another."

18 13. Code of Federal Regulations, Title 31, Part 10,
19 Section 10.22 incorporated in Treasury Department Circular 230,
20 Rules of Practice Before the Internal Revenue Service, provides
21 that each attorney, certified public accountant, enrolled agent,
22 or enrolled actuary shall exercise due diligence:

23 "(a) In preparing, or assisting in the preparation of,
24 approving, and filing returns, documents,
25 affidavits, and other papers relating to Internal
26 Revenue Service matters;

27 "(b) In determining the correctness of oral or written
representations made by him to the Department of
the Treasury; and

"(c) In determining the correctness of oral or written
representations made by him to clients with
reference to any matter administered by the
Internal Revenue Service."

14. Statement on Responsibilities in Tax Practice
No. 1, issued by the Federal Taxation Executive Committee of the
American Institute of Certified Public Accountants, states that

1 with respect to tax return positions, a CPA should comply with
2 standards, which include the following:

3 "(a) A CPA should not recommend to a client that a
4 position be taken with respect to the tax
5 treatment of any item on a return unless the CPA
6 has a good faith belief that the position has a
7 realistic possibility of being sustained
8 administratively or judicially on its merits if
9 challenged.

7 " (b) A CPA should not prepare or sign a return as an
8 income tax return preparer if the CPA knows that
the return takes a position that the CPA could not
recommend under the standard expressed above."

15. Respondent is subject to disciplinary action pursuant to section 5100 of the Code in committing acts of misleading advertising, failure to comply with continuing education requirements, breach of fiduciary responsibility, fraud, dishonesty and gross negligence in the practice of public accountancy as more particularly alleged hereinafter:

16 A.

17 FALSE AND MISLEADING ADVERTISING

18 On January 11, 1989, and on January 15, 1990,
19 respondent mailed to potential clients in the South Lake Tahoe
20 area letters in which he states that his firm "specializes" in
21 serving the total tax needs of businesses and in which he ensures
22 that his firm can generate tax savings through tax avoidance
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25 information to the South Lake Tahoe community via a letter dated
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27 save clients substantial taxes. Respondent claims that he can

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FRAUD AND GROSS NEGLIGENCE IN THE
PRACTICE OF PUBLIC ACCOUNTANCY:

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6 ADDITIONAL TAX RETURNS

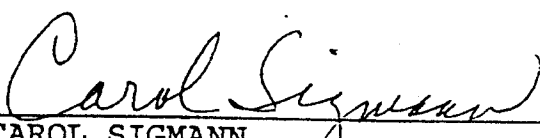
7 Respondent has counseled numerous clients to use the
8 'self employment tax elimination strategy'. In the proposed
9 arrangement there is no bona fide truck lease agreement between
10 husband and wife. Respondent's illegal scheme moves income that
11 would be subject to self-employment tax off Schedule C and onto
12 Schedule E where it is taxed only as ordinary income. This
13 scheme requires clients to fraudulently back-date an equipment
14 lease agreement and pink slip and execute a fraudulent truck
15 lease agreement between trucker-husband and wife. Respondent's
16 clients were advised and required to follow this back-dating of
17 the equipment lease and pink slip while fraudulently executing a
18 truck lease agreement to utilize the 'self employment tax
19 elimination strategy'.

20 NOTICE IS HEREBY GIVEN that pursuant to the provisions
21 of section 5107 of the Code, the Board seeks recovery for costs
22 of investigation and prosecution up to the administrative hearing
23 in this action.

24 WHEREFORE, complainant prays that a hearing be held,
25 and if the charges set forth herein are found to be true, the
26 Board of Accountancy discipline Certificate No. CPA 14669 issued
27 ///

1 to Bernard Joseph Rosa, Jr. to practice as a Certified Public
2 Accountant in the State of California and take such other action
3 as the Board deems proper.

4
5 DATED: May 6, 1993

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9 
10 CAROL SIGMANN
11 Executive Officer
12 Board of Accountancy
13 Department of Consumer Affairs
14 State of California

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26 JSP:ar 4/14/93
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BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

BERNARD JOSEPH ROSA, JR., C.P.A.
P.O. Box 10527
South Lake Tahoe, CA 96158

CPA Certificate No. 14669

Respondent

No. D1-93-11

OAH No. N-9410105

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Accountancy as the Decision in the above-entitled matter.

This Decision shall become effective on December 28, 1995.

IT IS SO ORDERED November 28, 1995

BOARD OF ACCOUNTANCY
STATE OF CALIFORNIA

BY: 

BEFORE THE
BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition to)	
Violate Probation Against:)	No. D1-93-11
)	
BERNARD JOSEPH ROSA, JR., C.P.A.)	OAH No. N-9410105
Certificate Number CPA 14669)	
)	
)	
Respondent.)	
)	

PROPOSED DECISION

On August 3, 1995, in Sacramento, California, Stephen J. Smith, Presiding Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Ronald Diedrich, Deputy Attorney General, Department of Justice, State of California represented the complainant.

Richard Travis, Jr., Attorney at Law, of Travis and Travis, Attorneys at Law represented respondent Bernard Joseph Rosa, who appeared in person.

Evidence was received, the matter was argued and submitted for decision. On August 24, 1995, the Presiding Administrative Law Judge issued an Order upon motion of the Deputy Attorney General, reopening the record for the limited purpose of substituting the original of the document marked and admitted in evidence as State's Exhibit 15 for the copy of the exhibit originally submitted. The record was then closed and the matter resubmitted for decision.

FINDINGS OF FACT

I

On September 15, 1994, Carol Sigmann, acting in her official capacity as Executive Director, Board of Accountancy (hereafter "the Board"), Department of Consumer Affairs, State of California, made the charges and allegations contained in the Petition to Violate Probation, and caused the Petition to be filed. In so doing, she acted pursuant to the authority of Business and Professions Code section 5100, which furnishes the Board jurisdiction to revoke, suspend or otherwise impose disciplinary action upon any person issued a Certificate by the State of California to practice accountancy, provided cause for the action is established by clear and convincing competent evidence.

Bernard Joseph Rosa, Jr., Certified Public Accountant, timely filed a Notice of Defense to the Petition, pursuant to Government Code section 11506. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, State of California, pursuant to Government Code section 11500, et seq.

On June 27, 1995, Ronald Diedrich, Deputy Attorney General, acting for Carol Sigmann, Executive Officer of the Board, as set forth above, made the charges and allegations contained in the First Amended Petition to Violate Probation (hereafter "the First Amended Petition"), and caused it to be filed. The Notice of Defense filed previously by Mr. Rosa was deemed effective to controvert and place at issue all allegations of the First Amended Petition.

II

On June 20, 1969, the Board issued Certificate Number CPA 14669, Certified Public Accountant (hereafter "C.P.A.") to respondent Bernard Joseph Rosa, Jr. The certificate was continuously renewed and remained in full force and effect until March 24, 1994. On May 6, 1993, the Board filed an Accusation against Mr. Rosa in case number AC-93-11, seeking to impose disciplinary action on Mr. Rosa. The disciplinary action was resolved by a Stipulation and Waiver entered into between the Board and Mr. Rosa, in which Mr. Rosa made certain admissions of violations of the Business and Professions Code that constituted unprofessional conduct, and agreed to a stayed revocation of his Certificate and a three year period of probation, during which time Mr. Rosa is on probation to the Board, subject to terms and conditions agreed upon by Mr. Rosa. Although the Stipulation and Waiver was signed by Mr. Rosa on December 23, 1993, containing his agreement to make the admissions of wrongdoing, and the entry of the stayed revocation and agreement to abide by the

probationary terms and conditions, the Board did not act to make the Order effective until March 24, 1994.

The instant action to revoke the probation was timely filed before the expiration of the probationary period, and the expiration of the probationary period is tolled as of the date of the initial filing, September 15, 1994. The tolling remains in effect until the effective date of the Board's Final Order that results from this Proposed Decision.

Other than the above, there is no previous history of disciplinary action by the Board against Mr. Rosa or his Certificate. The certificate is due to expire on November 1, 1996, unless renewed.

III

At all times relevant to this Decision, Mr. Rosa's address of record with the Board was P.O. Box 10527, South Lake Tahoe, California 96158. Although Mr. Rosa closed his South Lake Tahoe office that was located in a commercial building on a date not established in late 1992, he continued to maintain and operate a professional office in his home throughout the period of time relevant to this Decision. He continues to maintain the South Lake Tahoe residence/office, and maintains Yellow Pages advertising, holding himself out as available and providing professional accountancy services in the State of California.

During the period of time covered by this Decision, Mr. Rosa also had a limited accountancy practice in Nevada, at least until the Nevada Board of Accountancy revoked his Certificate to practice in that State, as set forth in detail below.

In December 1992, Mr. Rosa established a second residence in St. George, Utah. He also commenced a small professional accountancy practice from that home. Mr. Rosa is certificated to practice as a C.P.A. in the State of Utah. During the period of time relevant to this Decision, Mr. Rosa maintained both residences, travelling back and forth between them, and maintained both homes. He has since moved his family to the Utah residence, and has scaled down all his professional activities in California, but he has not given up either the residence or the remains of his professional practice in California.

The contention that Mr. Rosa never advised the Board that he had established a residence or professional practice in Utah is accurate. He continued to maintain a residence and practice at his address of record at South Lake Tahoe, and official contact with him there was not only possible but did occur during the probationary period. Therefore, it is not accurate to conclude that Mr. Rosa failed to advise the Board of

a change of his address of record. He did fail to advise the Board that he had left the State and undertaken to reside and practice at least part time in Utah. This failure deprived the Board of an opportunity to monitor his professional activities, as contemplated by the probation, and determine whether the expiration of the probationary period should continue or be tolled.

IV

In entering into the Stipulation and Waiver referred to in the Findings infra, Mr. Rosa admitted that he had engaged in misleading advertising, in that he represented that he and his firm could save potential clients substantial sums by engaging in tax avoidance strategies, practicing as a C.P.A. with an expired Certificate for an eleven month period, knowingly failing to complete continuing education courses for renewals of his Certificate for 1988 and 1990 periods, knowingly preparing, publishing and disseminating materially misleading financial statements and reports and that he had breached his fiduciary responsibilities, engaged in fraud, dishonesty and had been grossly negligent in the practice of public accountancy, all of which constituted unprofessional conduct, in violation of Business and Professions Code section 5100.

The Stipulation and Waiver also set forth several probationary terms and conditions, with which Mr. Rosa agreed to abide for the ensuing three years, in order to avoid the revocation of his Certificate. These probationary terms and conditions agreed to by Mr. Rosa as part of the Stipulation and Waiver, and the Order entered thereon, were as follows:

- "1. SUSPENSION As part of probation, License no. 14669 issued to respondent Bernard Joseph Rosa, Jr. is suspended for two months. During this period of suspension respondent shall not engage in any activities for which certification as a Certified Public Accountant or Public Accountant is required.
- "2. OBEY ALL LAWS Respondent shall obey all federal, California, other states' and local laws, including those rules relating to the practice of public accountancy in California.
- "3. QUARTERLY REPORTS Respondent shall, within 10 days of completion of the quarter shall submit quarterly written reports to the Board on a form obtained from the Board.
- "4. APPEARANCE AT ADMINISTRATIVE COMMITTEE MEETINGS Respondent shall report to and make personal

appearances at meetings of the Administrative Committee at the Board's notification, provided such notification is accompanied in a timely manner.

- "5. SURVEILLANCE PROGRAM Respondent shall cooperate fully with the Board of Accountancy, and with any of its agents or employees in their supervision and investigation of his/her compliance with the terms and conditions of this probation including the Board's Surveillance Compliance Program.
- "6. FURTHER INVESTIGATION Respondent shall be subject to, and shall permit, a practice investigation of respondent's professional practice. Such a practice investigation shall be conducted by representatives of the Board whenever designated by the Administrative Committee, provided notification to respondent of such an investigation is accomplished in a timely manner.
- "7. COMPLY WITH ALL BOARD ORDERS Respondent shall comply with all final orders resulting from citations issued by the Board of Accountancy.
- "8. TOLLING FOR OUT-OF-STATE PRACTICE OR RESIDENCE In the event respondent should leave California to reside or practice outside this State, respondent must notify the Board in writing of the dates of departure and return. Periods of non-California residency or practice outside the State shall not apply to reduction of the probationary period.
- "9. COMPLETION OF PROBATION TERMS In the event the respondent fails to satisfactorily complete any provision of the order of probation, which failure results in the cessation of practice, all other provisions of probation other than the quarterly report requirements, examination requirements, education requirements, and Administrative Committee appearances, shall be held in abeyance until respondent is permitted to resume practice. All provisions of probation shall recommence on the effective date of resumption of practice. Periods of cessation of practice will not apply to the reduction of the probationary period.
- "10. VIOLATION OF PROBATION If respondent violates probation in any respect, the Board, after giving respondent notice and opportunity to be heard, may revoke probation and carry out the disciplinary order which was stayed, If an accusation or a

petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

- "11. ETHICS COURSE AND EXAMINATION Respondent shall take and pass a Board approved ethics course and examination. The exam shall be passed prior to December 1, 1994. If respondent fails to pass said examination within the time period provided or within two attempts, respondent shall so notify the Board and shall cease practice until respondent takes and successfully passes said exam, has submitted proof of same to the Board, and has been notified by the Board that he/she may resume practice. Failure to pass the required examination no later than 100 days prior to the termination of probation shall constitute a violation of probation.
- "12. REIMBURSE THE BOARD FOR INVESTIGATION AND PROSECUTION COSTS Respondent shall reimburse the Board \$5,000 for its investigation and prosecution costs. The payment shall be made in thirty (30) equal monthly installments, the first installment to commence in thirty (30) days of the effective date of this Board decision.
- "13. LICENSE RESTORED Upon successful completion of probation, respondent's license will be fully restored.
- "14. CPE COURSES Respondent shall take and complete 80 hours of CPE courses as directed by the Administrative Committee, to be completed by October 31, 1994. These courses are in addition to the continuing education hours required for license renewal."

V

On March 24, 1994, the Board caused to be served upon Mr. Rosa a copy of the Board's Final Decision in the 1993 disciplinary action against Mr. Rosa, including the probationary terms and conditions set forth just above, together with a copy of the Stipulation and Waiver entered into between Mr. Rosa and the Board upon which the Order was based. The package of documents was served by the Board on Mr. Rosa at his address of record in South Lake Tahoe, California, by deposit into certified mail, return receipt requested, on March 24, 1994. It does not appear that the package was also served by first class mail. The

documents were not sent to any other address than Mr. Rosa's address of record.

The certified mail package of documents was claimed on April 4, 1994, by a person acting for Mr. Rosa. The April 4, 1994 date is difficult to read on the return receipt unaided, due to what appears to be a duplicated stamping that slightly smudges the dates. However, under magnification, the date the documents were signed for and received can be seen as April 4, 1994. Mr. Rosa testified that he did not personally retrieve the documents from the post office, and his wife signed for and received the package. This was one of the few points of his testimony that were credible.

The documents were prefaced by a cover letter to Mr. Rosa from the Board dated March 24, 1994. Both the letter and the Order advised Mr. Rosa that the two month suspension from the practice of accountancy, agreed upon in the Stipulation, would commence March 24, 1994. The letter further advised Mr. Rosa that he would be scheduled to appear before the Administrative Committee of the Board at their meeting, to be held April 28-29, 1995 in Sacramento, California. The letter further advised that Mr. Rosa would be notified at a later date of the exact date, time and location of the Administrative Committee meeting.

The cover letter enclosed a sufficient supply of quarterly reports and reminded Mr. Rosa that the quarterly reports were due no later than 10 days following the end of each quarter. It advised that the first of 30 monthly payments for reimbursement of costs was due April 23, 1994. Information was enclosed regarding the mandatory ethics examination and a form was enclosed upon which Mr. Rosa was to report continuing education and ethics course participation. The letter finished by advising Mr. Rosa that he was required to complete continuing education per the Stipulation, in addition to continuing education required for license renewal. Mr. Rosa was to be advised of the courses required for completion following his appearance at the Administrative Committee meeting.

VI

The Board moved at the commencement of taking of evidence at the hearing of this matter to dismiss the allegations of Paragraph 10 of the First Amended Petition, alleging that the tax avoidance technique promoted by Mr. Rosa constituted an illegal tax scheme. The motion was granted and the allegation was dismissed from the First Amended Petition.

VII

On April 14, 1994, an investigator working for the Board called a telephone number listed in the Placer/El Dorado

Yellow Pages for Mr. Rosa's professional C.P.A. practice. The Yellow Pages advertisement represented Mr. Rosa to have a C.P.A. practice located at South Lake Tahoe, California, and listed a telephone number for the office. The investigator called the number and received a recorded answer that she had reached "the office of Joe Rosa". She left her name and address to receive a package of documents regarding Mr. Rosa's services offered when the telephone recording offered same.

On April 18, 1994, the investigator received a package of documents from Mr. Rosa's office. The parties stipulated that the documents contained in the package and the services offered by the documents constituted the practice of public accounting within the State of California, for which a valid Certificate issued by the Board is required. The documents represented that Mr. Rosa was currently licensed to practice in California and presently ready, willing and able to furnish those services. There was no notice, express or implied, in these documents, that Mr. Rosa was suspended from the practice of accountancy at that time, or at any period that might have effected his ability to furnish the services offered.

The documents contained in the package represented to the receiver that Mr. Rosa was engaged in the practice of public accounting in the State of Utah as well as California. The package was mailed from St. George, Utah, and both the letterhead envelope and the letterhead on most of the documents represented that Mr. Rosa is a Certified Public Accountant with an office in the State of Utah. The documents offered Mr. Rosa and his firm to the receiver as a "full-service" accounting firm serving mainly interstate truckers, and offered the receiver an opportunity to save on taxes if Mr. Rosa was retained. The package enclosed a personal and firm profile of Mr. Rosa and his accountancy corporation. This profile, on the reverse, listed a fees for services schedule on letterhead representing Mr. Rosa's practice was located in South Lake Tahoe, California.

The enclosed fees for services schedule offered a "Self-employment tax elimination strategy" for a one time fee of \$1,475. Attached was an one page detailed explanation of how the tax elimination strategy is structured, and how it allegedly eliminates self-employment tax liability. Mr. Rosa's testimony revealed that this tax elimination strategy is the same strategy as that which was the core of one of the allegations against himself in the Accusation that resulted in the Stipulation and Waiver and the present disciplinary Order. For arranging for the taxpayer to engage in this tax avoidance scheme in the previous matter, Mr. Rosa had admitted wrongdoing in the Stipulation and Waiver and the Order based upon it. This strategy, although not alleged to have been outright illegal, resulted in Mr. Rosa's client in that previous matter having the transaction found by an Internal Revenue Service audit to have been a sham transfer and

not at arm's length, resulting in the transaction being unwound and treated as a nullity. This resulted in substantial additional taxes, penalties and interest being due from that taxpayer, as well as having to have experienced the misery of going through an audit on a tax scheme purchased at considerable cost from Mr. Rosa. The reason these adverse consequences occurred were that Mr. Rosa's strategy involved inter family back dated transfers of assets in transactions that were obviously not at arm's length or made at the time they were represented to be. It is not a mystery that the Internal Revenue Service determined these transfers to be a sham and voided them resulting in significant additional taxes, penalties and interest being assessed against the hopeless taxpayer.

Mr. Rosa testified that he actually received the package of documents from the Board, including the notification that the suspension period had begun "in April, perhaps the 20th or 24th." He testified that he also got notice to appear at the Board meeting at the same time. Later in his testimony he stated that he received the package "sometime in mid April". He testified that the signature on the receipt for certified mail card, acknowledging receipt of the Board's package of documents, looked like his wife's writing, but was certainly not his own. Since his family members all participate in the business, Mr. Rosa testified that as soon as he received the Board's document package, he immediately advised his family members that all practice must immediately cease, and he did so himself.

Mr. Rosa testified at several different points regarding his activities between March 24, 1994 and April 28, 1994. At one point he testified that he was in Los Angeles on April 14, 1994. Later he testified that he was in St. George, Utah on April 14, 1994. He also testified that since April 14 is the day before tax filing deadlines, he always turns off his telephones on that day. He adamantly denied receiving the Board's document package in early April 1994. Although he testified that he immediately ceased practice when he received the package, and so instructed his family members to do so as well, he testified at several later points that he only "scanned" the documents when he received them, did not really read them at any time, and paid them little mind because he considered the entire matter a "nuisance". He also testified several times that when he entered into the Stipulation, he was promised by the Deputy Attorney General that the actual suspension period would not commence until "after tax season", because that was customary with the Board. Mr. Rosa testified that he considered "after tax season" to be late April.

Later in his testimony, Mr. Rosa testified that his son sent the package of documents to the Board's investigator on April 18, 1994, and that he did not sign the cover letter himself. He testified that his son signed the cover letter

without his knowledge, and although his son usually asks permission to sign his father's name to documents associated with his C.P.A. practice, his son does not always do so. Mr. Rosa clearly implied in this testimony that he did not exercise much supervision over his son's C.P.A. practice related activities and did not always know when his son was acting in a practice related capacity without his knowledge, consent or oversight. Mr. Rosa's response, when queried about this lack of oversight, was to testify that, "In general, I'm responsible for the acts of family members in practice related activities, but only when the family members ask me in advance for permission to do the act and I approve." The clear implication of this testimony was that Mr. Rosa disavows responsibility for the acts of family members in C.P.A. practice activities if they act without his knowledge and consent. However, at the same time, Mr. Rosa himself has set the forces in motion for such acts to occur with some frequency.

Mr. Rosa's testimony that he did not receive notice from the Board that his suspension had begun until April 20 or 24th lacks credibility and persuasiveness. Whether he was in South Lake Tahoe, Utah or Los Angeles, it is clear that Mr. Rosa was unmotivated to read or comply with the Board's Order until he himself determined he would do so. It appears from all the circumstances that Mr. Rosa believed the suspension should not begin until after "tax season" which he dated in early May, and he had no intention of allowing his practice to be suspended until this time. Mr. Rosa made it clear that he considered the Board's action and Order a "nuisance", and that he was not going to voluntarily comply with any significant part of it unless he decided to do so on his own terms or was compelled to do so.

Mr. Rosa's wife received the Board's package on April 4, 1994. It is unreasonable to conclude that Mr. Rosa did not see the official documents for 20 more days, or that he did not know that the Board's Order had taken effect. His testimony about his son sending out the document package, which clearly implied that his son had continued his C.P.A. practice without his knowledge or consent, reveals an inconsistent alternative contention, to wit, that if he did have notice of the suspension, he cannot be held culpable because his son acted without his knowledge, and presumably against his instructions that all family members cease participating in the practice.

Considering all of Mr. Rosa's testimony, his behavior and attitude toward the Board and its efforts to regulate his practice, and the myriad of inconsistencies in his excuses for his unwillingness to cooperate and comply with the Board's Order, all combined to produce testimony manifestly unconvincing, lacking in credibility and unpersuasive. His contention that he did not receive notice of the effective date of the suspension until April 20 or 24, and that he immediately suspended his practice when he received notice is no exception.

VIII

On February 16, 1995, the Nevada State Board of Accountancy (hereafter "the Nevada Board") entered its Findings of Fact, Conclusions of Law and Decision in its disciplinary action against Mr. Rosa. The Decision was issued after an evidentiary hearing that occurred on November 30, 1994, at which Mr. Rosa testified in person. The Decision revoked Mr. Rosa's Certificate to practice accountancy in the State of Nevada. The Decision was based ... "on the California Decision and the facts presented at the hearing." The California Decision was identified in the Nevada Board's Findings of Fact as the Order that resulted from the Stipulation and Waiver, as set forth above, and for which Mr. Rosa is currently on probation to the Board.

Findings 9 and 10 of the Nevada Decision are noteworthy. Finding 9 states, "Respondent testified that he is not in compliance with the California Decision based upon his failure to take the eighty (80) hours CPE courses required by the California Decision, which are in addition to the normal continuing education hours required for licensure; his failure to pay in accordance with the California Decision all monthly installments in the reimbursement of its investigation and prosecution costs of \$5,000, being delinquent on three (3) payments; and his failure to take and pass a California State Board approved ethics course."

Finding 10 of the Nevada Decision states, "Respondent testified that despite his admissions in the California Decision, he has no intention of discontinuing his advertising practices or the tax avoidance strategies given to clients which were the subject of the California Decision."

Finding 6 of the Nevada Decision states, "In the California Decision, Respondent clearly admitted to advising a client to enter into a tax avoidance strategy for a prior tax year by having documents backdated with no arm's length business purpose attributed thereto."

The Nevada Decision makes no mention of Mr. Rosa having mentioned or raised any defense to his admitted failure to comply with the California Decision and its terms and conditions due to his belief that compliance was excused as a result of his filing bankruptcy and the implementation of the automatic stay.

Mr. Rosa's testimony regarding the Nevada Decision was curious. He repeatedly insisted that his Certificate was not revoked in the State of Nevada, and that proceedings in Nevada would not be complete until the results of this hearing are final. This view of the Nevada Board's Decision is simply not rational.

IX

To date, Mr. Rosa has taken none of the 80 hours of additional continuing education required by his probation. It did not appear that he had taken any of the additional continuing education ordinarily required to maintain his Certificate, beyond that required by the probation. He testified that he did take classes, in fact, he testified he takes continuing education "everyday", "but not the ones they told me to". He testified regarding the courses the Board instructed him to take by commenting, "I was not specifically concerned about those courses. I was keeping up my courses and my professional stature". No documentary evidence of completed continuing education courses of any sort were offered by Mr. Rosa, nor did he mention any specific course, date taken, duration or subject matter of any such course he alleged he took. The Quarterly Written Report of Compliance dated October 6, 1994 Mr. Rosa did submit makes vague reference to the completion of "various self study IRS rules-regs" as continuing education courses, but provides no meaningful detail. Mr. Rosa's contention in his testimony that he is in compliance with the requirements of his probation regarding continuing education is patently without merit. This failure is aggravated by the fact that one of the causes of discipline against him in the previous Board action was Mr. Rosa's failure to complete mandatory continuing education courses in any of the two years previous to that action. Under these circumstances, Mr. Rosa's has clearly communicated his unwillingness to comply with this mandatory aspect of certification as a C.P.A., even in the shadow of a significant sanction for his failure to do so.

X

Mr. Rosa did not notify the Board that he was residing or practicing outside the State of California at any time relevant to this matter. Mr. Rosa endeavored to contend the Board should have known he was living and practicing in Utah because negotiations were conducted for the Stipulation and Waiver with him when he was there. He points to the fact that the Deputy Attorney General in the earlier matter sent him a facsimile of the Stipulation and Waiver in Utah and he sent it back signed from there as well.

The contentions have no merit. Mr. Rosa never wrote or called the Board to advise them that he was living or working in Utah. Although Mr. Rosa correctly contends that he may have more than one residence and practice in more than one state, he neglected to recognize that he is under an obligation to notify the Board of those facts pursuant to his probationary terms. Although he was personally present at the Board's Administrative Committee meeting on April 23, 1994, he neglected to mention that

he was living or practicing anywhere but in South Lake Tahoe, California.

XI

Mr. Rosa filed at least one of the required Quarterly Written Reports of Compliance. The Report was dated and signed by Mr. Rosa on October 6, 1994, to cover the period July 1, 1994 through September 30, 1994. It was not clear whether Mr. Rosa filed an earlier Quarterly Report, covering the previous quarter. Such a document was not offered in evidence. It is clear that Mr. Rosa has not filed a Quarterly Report since the October 6, 1994, despite the fact the Board furnished him with all the forms necessary to continue filing in the package of documents delivered on April 4, 1994.

The Quarterly Report Mr. Rosa did file, dated October 6, 1994, contained materially false statements. In response to question 5(c), Mr. Rosa replied "Yes" in response to the question that asked whether he had complied with each and every term and condition of probation. The response was false and Mr. Rosa knew the response was false when he made it.

XII

Mr. Rosa has not completed an ethics course, nor passed the Board's ethics examination, either before or after the December 1994 deadline. Mr. Rosa attempted to excuse his failure to comply with these conditions by blaming the Board's refusal to communicate with him civilly as creating an impediment to him finding out what to take and when to take it. There may have been a communication impediment between Mr. Rosa and the Board, but this is at least in part attributable to Mr. Rosa's approach to the Board, and largely due to his unwillingness to make continuing and persevering efforts to obtain the information he needed and then make certain he complied. Mr. Rosa revealed in his entire testimony and presentation such a striking void of motivation to comply with this or any of the probationary terms, unless literally compelled to do so, it is difficult to imagine Mr. Rosa having completed the course and the examination in the time provided, even had he obtained all the necessary information at the first instance.

XIII

At the Board's Administrative Committee meeting on April 23, 1994, Mr. Rosa tendered his first check for \$166.67, to begin payment pursuant to the Order of investigation costs of \$5,000 that he had agreed to in the Stipulation and Waiver. The probationary terms and conditions called for monthly payments in that amount beginning April 24, 1994 and continuing monthly thereafter for the next 30 months.

Mr. Rosa made a second payment in the correct amount that was received and credited to him by the Board on June 28, 1994. This payment was credited against the payment due May 24, 1994, which was one month in arrears at the time. A third payment was received and credited by the Board on August 28, 1994. This payment was credited against the June 24, 1994 payment, which was now two months in arrears. No further payments have been made, and it was quite clear from Mr. Rosa's testimony that he does not intend to make any further payments short of being reinstated on all terms and conditions of this probation, which would be tantamount to a dismissal of this action.

The Board's Administrative Committee meeting of April 23, 1994 was apparently a disaster. The conversation between the Board members and Mr. Rosa was hostile and acrimonious. Mr. Rosa recognizes that at least part of this problem stemmed from his taking the attitude with the Board that "I felt that I was better than the Board and I talked down to them. I felt they were putting me where I did not belong. No one was hurt here." It is clear that Mr. Rosa communicated to the Board what he testified to in this hearing, to wit, his attitude that he did nothing wrong in the previous matter, that the whole matter was a nuisance and that no one was hurt, and that he cannot understand why there is such a big fuss. Mr. Rosa further antagonized the Board members present where he mentioned that he only scanned the documents implementing probation and the suspension received April 4, 1994, and that he did not read them with any particular interest.

Mr. Rosa mentioned to the Board that he was intending to file bankruptcy and that he would thereby be relieved of the obligation to pay the Board anything further on the monthly payments. These comments led to further acrimonious discussion regarding Mr. Rosa's obligation to pay the Board these sums, bankruptcy or no.

XIV

On May 9, 1994, Mr. Rosa filed a voluntary petition in the United States Bankruptcy Court, Eastern District of California for adjudication as a bankrupt pursuant to Chapter 7 of the Federal Bankruptcy Act. The Board was not named as a creditor in the Petition. When asked if he ever served the Board a copy of the filing, Mr. Rosa testified, "I didn't think it was necessary to send them a copy".

Mr. Rosa testified that the reason he had not complied with the terms and conditions of his probation was his belief that his compliance with all of the terms and conditions of his probation had been excused by the commencement of the automatic stay that resulted from his bankruptcy filing. He testified he

relied upon the advice of the bankruptcy trustee, who advised him that he was not to pay any financial obligations without court approval until the bankruptcy estate was settled, and his attorney's advice to the effect that any action having to do with his professional certificate was stayed automatically by the filing, which Mr. Rosa interpreted to mean his obligation to comply with the terms and conditions of his probation. From this advice, Mr. Rosa deduced that he was no longer required to make payments on the investigative fees recovery, make quarterly reports, complete the continuing education requirements, take and pass the ethics course and exam, or comply with any of the other terms of his probation, for these were all related to an action against his professional license.

This contention might have had more of a ring of truth and persuasiveness to it had Mr. Rosa's behavior been consistent with the contention from the filing forward. For example, Mr. Rosa did not name the Board as a creditor in the action, did not serve the Board with a copy of the Petition, nor did he ever provide the Board with any sort of notice whatsoever that he considered the automatic stay to have also stayed his obligation to comply with all the non-financial obligations of his probation. He never mentioned this defense when queried by the Nevada Board regarding why he had not complied with his California probation. He filed one Quarterly Report on October 6, 1994, several months after he contends his obligation to do so was excused by the automatic stay. He made two additional payments to the Board well after the stay went into effect. Mr. Rosa's testimony that the reason he did these things after the automatic stay went into effect because he was endeavoring to comply with all his probationary terms is curiously inconsistent with his contention that the stay excused his obligation to do so. Finally, Mr. Rosa never mentioned at any time to anyone in authority at the Board that he considered his obligation to continue to comply with all his probationary obligations, including those having nothing to do with any financial obligation, automatically stayed by the bankruptcy filing. He never sought to confirm his impression that his obligations were excused through anyone at the Board. As far as anyone at the Board knew, Mr. Rosa had not filed bankruptcy and was only occasionally complying with a few of the probationary terms.

Mr. Rosa's contentions that his obligations to comply with the nonfinancial obligations of his probation are later fabrications, interposed in an endeavor to defeat the Board's efforts to hold him accountable for his deliberate refusal to comply fully and completely with his probationary responsibilities.

The Board introduced a certification of costs of investigation and prosecution for this matter. The costs certification revealed an expenditure of \$11,267.22. The costs were broken down only by year and by category of person furnishing the services. The Board did actually incur and pay the costs set forth in the certification.

The Board spent a total of \$3412.72 for the Board's investigative C.P.A. for fiscal years 1993-94, 94-95 and 95-96. The testimony of the Board's investigative C.P.A. provided some measure of detail for these expenditures. Further, her testimony also proved the hours spent and expenditures made were reasonable and clearly connected to the investigation and prosecution of this matter. Mr. Rosa's obstinate refusals to comply with his probationary obligations were largely responsible for the expenditure of these costs.

The Board spent \$1,643.25 for 18.75 hours of investigation services from the Division of Investigation. The investigator providing these services testified regarding her activities for which this billing was incurred. These services included looking up Mr. Rosa's telephone number in the Yellow Pages, calling his office and requesting the documents, and a single trip to South Lake Tahoe where she discovered he had closed his commercial space office, a short conversation with Mr. Rosa's former commercial landlord, a short drive to his home and knock on the door, receiving no answer. She also prepared a report of her activities. She conducted no follow-up or any other activities. This evidence revealed that the Division of Investigation's billing for 18.75 hours of investigative services was excessive and unreasonable when compared to the actual services rendered. It was apparent that the actual work done, including reasonable travel and report preparation time, should have taken no longer than 10 hours. At the rate stated of \$87.64 per hour, which also appears to be quite pricey for the 1993/94 fiscal period, the reasonable amount recoverable is \$876.40.

The Deputy Attorney General's costs for case preparation over two fiscal years was \$6,211.25. These costs include costs for fiscal 1994/95 and fiscal 1995/96. The case file and evidence submitted reveals significant legal work occurring during both periods, including the initial Petition being reviewed, prepared and filed in the first fiscal year, and the First Amended Petition being prepared and filed in the most recent. It was not proved that these expenditures were unreasonable, although the lack of itemization, made the determination of reasonableness significantly more difficult.

Therefore, the total costs found to be reasonable within the meaning of Business and Professions Code section 5107 in this action amount to \$10,500.37.

XVI

Mr. Rosa is now living predominately in St. George, Utah, where he has moved his family. His testimony regarding his current professional practice activities for which a Certificate is required was rather vague, and he proved rather elusive when pressed for details regarding this subject as well as most other subjects. He testified that his Certificate is important to him, and that it is the primary means by which he and his family derive their livelihood. Yet he testified that he has almost no practice now in California and that he only practices "a little" from his home in Utah. His stated desire to retain his Certificate and his practice, and its stated importance to him, were highlighted in stark contrast against his resistant, unrepentant and noncompliant behavior in meeting his probationary responsibilities. The manner in which Mr. Rosa has approached his probationary responsibilities has been accurately described in his own words, which described the Board's previous disciplinary action against him as a "nuisance". Mr. Rosa did not hesitate to take every possible opportunity to blame his failure to make any meaningful or reasonable efforts to meet and discharge his probationary obligations on any thread of a reason available. There was no hint of Mr. Rosa accepting responsibility to meet and comply with his probationary obligations, and never any indication of remorse that he had failed to do so to date.

Placing Mr. Rosa back on any sort of probation under these circumstances would constitute an exercise in futility and a manifest waste of Board resources to monitor such an arrangement. Such efforts should be reserved for the remorseful, genuinely repentant and those motivated to make the effort to conform their conduct to the Board's reasonable efforts to regulate their professional activities. Mr. Rosa took considerable pains to reveal that none of the above apply to himself.

DETERMINATION OF ISSUES

I

Mr. Rosa violated Business and Professions Code sections 5050 and 5051. As set forth in Findings IV, V and VII, Mr. Rosa practiced public accounting between April 14, 1994 and April 18, 1994, a time at which his Certificate to practice as a public accountant in the State of California was suspended. In

so doing, Mr. Rosa violated Business and Professions Code section 5100(i) and Title 16, California Code of Regulations, section 63.

Mr. Rosa's contention that he was unaware of the suspension until April 20 or 24, or until mid-April, depending on the version, is totally lacking in credibility and persuasiveness, as set forth in the same Findings. The document package was delivered to Mr. Rosa's address of record on April 4, 1994, and apparently claimed by his wife. It stretches credulity beyond limits to believe that he had no notice from his wife of the receipt of such an important package of documents until some two or three weeks later. Receipt by his wife at his address of record constitutes constructive receipt by Mr. Rosa of the documents and the notice of the commencement of the period of suspension.

Mr. Rosa's contention that the period of suspension is not effectively commenced until such time as he receives actual or constructive notice of same is well taken. The date of the suspension's commencement as set by the Board in the documents was March 24, 1994, which was the same date the documents were mailed to Mr. Rosa. Therefore, the actual effective date of the commencement of the suspension period is April 4, 1994, the date of constructive receipt by Mr. Rosa of the notice.

Perhaps in anticipation of the potential problem that no one would believe he would not have been given or told about the Board's document package by his wife in the two to three weeks following receipt, Mr. Rosa offered two alternative contentions. The first was that his son had sent out the April 18, 1994 documents package, holding Mr. Rosa out as still in practice after receipt of the notice he had been suspended, without his knowledge or consent. The second, Mr. Rosa's testimony that he only "scanned" and did not read the documents carefully, inferring that even though he had the documents and knew of them, he may not have known when the actual suspension period began until he was getting ready to appear before the Board's Administrative Committee. Vagueness in endeavoring here to describe this contention and the inferences that Mr. Rosa appeared to be raising were the direct result of the vagueness of the testimony itself. His testimony did not go so far as to actually say he did not read the part where the suspension was ordered or its effective date.

Neither of these contentions have any merit. It may be that Mr. Rosa's son did respond to the investigator's inquiry regarding C.P.A. services that occurred during the period of suspension without Mr. Rosa's knowledge or consent. Mr. Rosa testified that all family members participate in the practice, but he tersely denied his responsibility for any of their acts or omissions related to his practice for which he had no knowledge or did not give his consent. Unfortunately for Mr. Rosa, the law

is exactly the opposite. If family members assist in the practice, Mr. Rosa is required to supervise their activities and is responsible for all of their acts and omissions, whether he knows of them or consents to them or not. The acts of his son in sending the package to the Board's investigator, representing Mr. Rosa was still practicing during the period of suspension, is deemed to be the act of Mr. Rosa, his knowledge or consent notwithstanding. In like manner, his failure to read the documents and familiarize himself with the commencement date of the period of suspension, constitutes no defense to the allegation.

As set forth in Finding VII, Mr. Rosa made materially misleading statements in the package of documents sent under his name and professional accountancy practice to the investigator, who was perceived to be a potential client, regarding his status and ability to practice public accounting at the time the documents were furnished to the potential client. By violating Title 16, California Code of Regulations, section 63, Mr. Rosa violated Business and Professions Code section 5100(f), in that he willfully violated one of the Board's regulations regarding the professional practice of accountancy. Mr. Rosa did continue to practice as a C.P.A. after receiving notice some ten to fourteen days earlier that his certificate was suspended. The above violations constitute cause to revoke Mr. Rosa's previously imposed probation and reinstate the previously imposed but stayed revocation of his Certificate.

II

Title 11, United States Code section 362 states, in pertinent part:

"Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title ... operates as a stay, applicable to all entities, of-

"(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

"(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

".....

"(6) any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title;

"....."

Mr. Rosa contends that the automatic stay provisions of the United States Bankruptcy Act quoted above excuses his obligation to comply with all of the provisions of his probation, and those same provisions forbid the Board from enforcing those provisions against him or disciplining him for his failure to comply. The contention is entirely without merit. Not only is the contention without a substantial legal foundation, Mr. Rosa's own behavior during and after the filing of the petition in bankruptcy, triggering the automatic stay, strongly indicates that the contention is a later fabrication, erected in an endeavor to defeat the enforcement action and his excuse his purposeful noncompliance with his probationary obligations, rather than a reasonably believed impediment to his ability to comply.

Following the filing, when the stay was supposed to have excused his compliance with probation, Mr. Rosa made a quarterly report and two payments on the outstanding balance of investigative costs due. There was and is a legitimate dispute regarding the effect of the automatic stay on the requirement to make financial payments, yet he made two payments. Mr. Rosa characterizes such efforts as evidence of his good faith efforts to comply with the Board's requirements. It is better evidence of the fact that the defense based upon the automatic stay was created later, and was neither known nor a factor in Mr. Rosa's refusal to comply with his probationary obligations until a much later point in time. This is confirmed by the fact that Mr. Rosa has made no effort of any sort to comply with any of the terms of his probation since the petition was discharged several months after the filing. It was not disputed that the petition had been discharged, and that the discharge of the petition lifted the automatic stay. Yet there has been no tender by or communication from Mr. Rosa regarding any effort to recommence any compliance with his probation since the discharge. It is difficult to contend the probationary obligations had been discharged in the petition, since the Board was neither named in nor served with the petition. Mr. Rosa's unwillingness and refusal to conform his behavior to the requirements of probation significantly predated any notion that the automatic stay might excuse some or all of those obligations.

III

Title 11, United States Code section 362(b) states, in pertinent part:

"The filing of a petition under section 301, 302 or 303 of this title...does not operate as a stay-

".....

"(4) under section (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit's police or regulatory power;

"(5) under section (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, other than a money judgment, obtained in an action by a governmental unit to enforce such governmental unit's police or regulatory power;

".....

"(c) Except as provided in subsections (d), (e) and (f) of this section-

"(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

"(2) the stay of any other act under subsection (a) of this section continues until the earliest of-

".....

"(C) if the case is a case under chapter 7 of this title [11 USCS sect. 701, et seq.] concerning an individual..., the time a discharge is granted or denied.

"....."

It is not disputed that the Board is a "governmental unit" within the meaning of subsection (b) above, or that its commencement and continuation of the instant action is an exercise of its statutorily authorized regulatory power.

"Section 362(b)(4) indicates that the stay under Section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding

by a governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in the property of the debtor or the property of the estate." 124 Cong. Rec. H 11092, H 11093 (Sept. 28, 1978).

"There are two 'tests' for determining whether government acts are within the ambit of section 362(b)(4). In In Re Thomassen, 15 B.R. 907 (Ninth Cir. B.A.P.) we discussed the 'pecuniary purpose' test ... We noted that the pecuniary purpose test distinguishes 'between governmental actions which are aimed at obtaining a pecuniary advantage for the unit in question or its citizens, and those actions which represent a direct application of the unit's police or regulatory powers. Id. The aim of the pecuniary purpose test is preventing the circumvention of the relief available to both debtors and general creditors under the Bankruptcy Code ... State and local governmental units cannot, by an exercise of their police or regulatory powers, subvert the relief afforded by the federal bankruptcy laws. When they seek to do so for a pecuniary purpose, they are automatically stayed, notwithstanding the exception found at section 362(b)(4).' In Re Poule (1988) 91 B.R. 83, 86 (9th Cir. B.A.R.), citing Thomassen, p. 909.

"...[T]he second test [is] the 'public policy test' ... The 'public policy test attempts to distinguish between those proceedings which fulfill a public policy and those which adjudicate private rights' Poule, p.86, citing In Re Charter First Mortgage, Inc. (1984) 42 B.R. 380 (Bankr. D.Or.). Under this test, the court considers whether the administrative agency is exercising legislative, executive or judicial functions. Where the agency's action affects only the parties immediately involved in the proceeding, it is exercising a judicial function and the debtor is entitled to the same protection from the automatic stay as if the proceedings were being conducted in a judicial forum." In Re Poule, p. 86.

In In Re Thomassen, above, the court held the automatic stay of section 362(a)(1) did not bar license revocation proceedings by the Board of Medical Quality Assurance following the filing of the licensee's petition pursuant to Chapter 11 of the Bankruptcy Act. In finding that neither the pecuniary

interest nor the public policy tests were violated by the license revocation proceedings, the court held, "The State's interest in this matter is in punishing such misconduct and preventing future acts of the type which Dr. Thomassen has been accused. This is a valid police and regulatory interest." Thomassen, p. 909. Similarly, the court held in In Re Poule, above, that an action by the Contractor's State License Board to impose civil penalties against a bankrupt contractor for violations of Business and Professions Code sections 7107, 7108, 7116 and 7119 were not stayed by the automatic stay, but an order of correction that purported to adjudicate private rights between the contractor and the individual that had contracted for the services was stayed. "The authority to protect the public welfare would be largely meaningless without the power to punish and prevent...Such steps violate neither the pecuniary purpose nor the public policy test." Poule, at p.86. A similar result occurred in Parker Electric v. Contractors State License Board (1986) 187 Ca.App.3d 205, 211, where the disciplinary action by the Board was held not automatically stayed upon a factual basis that the motivating factor for the action was not pecuniary.

There is no doubt in this matter that the Board's action to enforce the probationary terms and conditions imposed upon Mr. Rosa fail neither the "pecuniary test" nor the "public policy test" set forth in the authorities above, saving and excepting the term requiring the repayment of the \$5,000 for the Board's investigative costs (Term L). In all other respects, the action has no pecuniary aspects whatsoever, and constitutes a legitimate exercise of its statutorily mandated regulatory function of overseeing the accountancy profession and insuring the highest standards of practice for its Certificate holders. As In Re Poule states for contractors and their regulatory Board, "The Contractor's Licensing Law is a legitimate exercise of California's police power and the acts involved in this case are of a type the state has a legitimate interest in preventing and punishing". Poule, p.87. By the same token, the Board's efforts to enforce a probation that was imposed for a variety of acts and omissions constituting unprofessional conduct, fraud and misleading statements is not pecuniary, and is a legitimate exercise of its regulatory authority. The exception to the automatic stay of section 362(a)(1) set forth in section 362(b)(4) applies to all of the probation except the reimbursement of investigative costs set forth in Term L. Accordingly, Mr. Rosa's contention that his failure to comply with the remainder of his probationary terms and conditions without any legal support.

The recovery of investigative costs term was covered by the automatic stay, but only for as long as it was in effect. The stay is lifted and has been for some time now, upon the discharge of the case. The obligation to repay the investigative costs set forth in the probationary term was not listed as an

obligation of Mr. Rosa's bankruptcy estate, nor was any notice of the filing ever given to the Board. Therefore, the obligation was not extinguished by the discharge in bankruptcy, and the probationary obligation to continue making payments was reactivated upon the discharge.

Nor may Mr. Rosa contend that his failure to meet and comply with his probationary obligations was excused due to a honest but unreasonable reliance upon a mistake of law, as a result of the commencement of the automatic stay. By the time Mr. Rosa discovered that this might be a defense to his failure to meet his obligations, the bankruptcy was already several months old, and Mr. Rosa was already several months into significant default on nearly every term. There is nothing credible or persuasive in the evidence to suggest that Mr. Rosa's initial or continuing failures to meet his probationary obligations were based upon an honest but unreasonable reliance that those obligations were excused by the commencement of the automatic stay.

IV

Mr. Rosa violated Business and Professions Code section 5100. As set forth in Findings IV, V, and VII, Mr. Rosa violated Condition A of his probation, which imposed a two month suspension of his Certificate and right to practice as an accountant, in that he continued with the practice of accountancy after he received notice at his address of record that his Certificate had been suspended for a period of two months. Such violation constitutes cause to revoke the previously imposed probation and remove the stay from the previously imposed revocation of Mr. Rosa's Certificate.

V

Mr. Rosa violated Business and Professions Code section 5100. As set forth in Findings IV, V, and VII, Mr. Rosa violated Condition B of his probation, which requires him to obey all laws, in that he continued with the practice of accountancy in violation of Business and Professions Code section 5050 after he received notice at his address of record that his Certificate had been suspended for a period of two months. Such violation constitutes cause to revoke the previously imposed probation and remove the stay from the previously imposed revocation of Mr. Rosa's Certificate.

VI

Mr. Rosa violated Business and Professions Code section 5100. As set forth in Findings IV and IX, Mr. Rosa violated Condition C of his probation, which requires him to timely submit quarterly reports. Mr. Rosa failed without justification or

mitigation to submit any quarterly report past October 6, 1994. Such violation constitutes cause to revoke the previously imposed probation and remove the stay from the previously imposed revocation of Mr. Rosa's Certificate.

VII

Mr. Rosa violated Business and Professions Code section 5100. As set forth in Findings II, IV and X, Mr. Rosa violated Condition H of his probation, which requires him to timely notify the Board if he lives or practices outside the State of California. Mr. Rosa failed to advise the Board that he had established a residence and opened an accountancy practice in the State of Utah. Such violation constitutes cause to revoke the previously imposed probation and remove the stay from the previously imposed revocation of Mr. Rosa's Certificate.

VIII

Mr. Rosa violated Business and Professions Code section 5100. As set forth in Findings IV and XII, Mr. Rosa violated Condition K of his probation, which requires him to take and pass an ethics course and examination. Mr. Rosa's effort to blame the Board for his failure to obtain information regarding what course to take and its particulars, as well as make arrangements to take the examination are unpersuasive and do not provide a defense to the allegation, nor a factor in justification or mitigation of the violation. Mr. Rosa simply made no meaningful effort of his own to meet and discharge this condition. Such violation constitutes cause to revoke the previously imposed probation and remove the stay from the previously imposed revocation of Mr. Rosa's Certificate.

IX

Mr. Rosa violated Business and Professions Code section 5100. As set forth in Findings IV, XII, XIII, XIV and Determination III, Mr. Rosa violated Condition L of his probation, which requires him to repay the Board \$5,000 in investigative costs for the previous disciplinary matter that resulted in the imposition of the probation. As set forth in Determination III, this obligation was stayed during the pendency of the automatic stay. The bankruptcy has now been discharged, the automatic stay has been dissolved by operation of law, and the obligation to make these payments was not discharged in the bankruptcy. Before the filing, Mr. Rosa was arguably in compliance with this provision of his probation, albeit late with the first payment. After the discharge, the obligation has again become due and owing, and Mr. Rosa has failed to comply with it. Such violation constitutes cause to revoke the previously imposed probation and remove the stay from the previously imposed revocation of Mr. Rosa's Certificate.

Mr. Rosa violated Business and Professions Code section 5100. As set forth in Findings IV and IX, Mr. Rosa violated Condition N of his probation, which requires him to take 80 hours of continuing education over and above that required to renew his Certificate. In this particular violation, Mr. Rosa rather graphically demonstrated his resistance to the Board and its oversight of his activities. As set forth in the Findings, Mr. Rosa made it clear that he takes continuing education, but not those courses the Board directed. One of the grounds of discipline against him in the previous Accusation, resulting in this probation, was Mr. Rosa's unwillingness and refusal to take Board mandated continuing education for the two years previous to that matter. Mr. Rosa's haughty attitude toward what the Board expected him to take was clearly communicated in his testimony, leaving the unmistakable impression that he knew better than the Board which courses were meaningful and that he believed what the Board was requiring was a waste of his time. Notwithstanding Mr. Rosa's contentions that he had taken continuing education "every day", there was no meaningful, persuasive evidence that Mr. Rosa had made any legitimate effort of his own to meet and discharge this condition. Such violation constitutes cause to revoke the previously imposed probation and remove the stay from the previously imposed revocation of Mr. Rosa's Certificate.

XI

Business and Professions Code section 5107(a) states, "The executive officer of the Board may request the administrative law judge, as part of the proposed decision in a disciplinary proceeding, to direct the holder of any permit or certificate found guilty of unprofessional conduct in violation of subdivisions (b), (c), (i), and (j) of Section 5100, or involving a felony conviction in violation of subdivision (a) of Section 5100, or involving fiscal dishonesty in violation of subdivision (h) of Section 5100, to pay to the Board all reasonable costs of investigation and prosecution of the case, including, but not limited to, attorney's fees. The board shall not recover costs incurred at the administrative hearing."

As set forth in Finding XV, the Board proved that it incurred reasonable costs in the investigation and prosecution of this matter. A violation of subdivision (i) of section 5100 was proved, which triggers the right to an Order recovering those costs, as set forth in section 5107(a). The triggering subdivision relates to dissemination of false and misleading reports in the practice of accountancy, as set forth in Findings IV, V and VII. Therefore, the right to recover costs as set forth in section 5107(a) attaches, and the Board shall recover its costs as modified, \$10,500.37, as forth in Finding XV.

XII

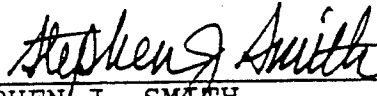
As set forth in Finding XVI, there is no option in this matter but to set aside the previously stayed revocation in this matter, and impose that revocation. Mr. Rosa has demonstrated a significant resistance to the Board's efforts to regulate his professional activities for which a Certificate is required. He considers the Board's previous disciplinary action a nuisance, and his resistance to meeting his later obligations as a result certainly attest to the fact that his opinion has not changed.

ORDER

The allegations of the Petition to Violate Probation are sustained. Bernard Joseph Rosa, Jr., C.P.A. violated his probation imposed in Case number AC-93-11 in the several respects set forth in the Determinations. The stay of the revocation of Certificate number CPA 14669, issued to respondent Bernard Joseph Rosa, Jr., Certified Public Accountant, entered in Case number AC-93-11, is set aside and dissolved, and the revocation imposed in that matter is reinstated and imposed. Therefore, Certificate number CPA 14669, issued to Mr. Rosa, is revoked. The Board shall recover its costs in the sum of \$10,500.37 from Mr. Rosa.

Dated: _____

October 24, 1995



STEPHEN J. SMITH
Presiding Administrative Law Judge
Office of Administrative Hearings

1 DANIEL E. LUNGREN, Attorney General
of the State of California
2 JOEL S. PRIMES, State Bar No. 42568
Supervising Deputy Attorney General
3 RONALD L. DIEDRICH, State Bar No. 95146
Deputy Attorney General
4 1300 I Street
P.O. Box 944255
5 Sacramento, California 94244-2550
Telephone: (916) 324-5329
6 Facsimile: (916) 324-5567

7 Attorneys for Complainant

8 BEFORE THE
BOARD OF ACCOUNTANCY
9 DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

10 In the Matter of the Accusation and) No. D1-93-11
11 Petition to Revoke Probation Against:)
12 BERNARD JOSEPH ROSA, JR., CPA)
P.O. Box 10527)
13 South Lake Tahoe, CA 96158) FIRST AMENDED
14 License No. CPA 14669) ACCUSATION AND
15 Respondent.) PETITION TO
REVOKE PROBATION

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18 Carol Sigmann ("complainant"), alleges as follows:

19 1. Complainant is the Executive Officer of the Board
20 of Accountancy, Department of Consumer Affairs, State of
21 California ("Board") and files this Petition to Revoke Probation
22 in her official capacity as such and not otherwise.

23 2. Bernard Joseph Rosa, Jr. ("respondent") was issued
24 license number CPA 14669 on June 20, 1969.

25 The Board revoked said license effective March 24,
26 1994, in case number AC-93-11. However, pursuant to an agreement
27 entered into between respondent and the Board, said revocation
28 was stayed and respondent was placed on three (3) years

1 probation. Copies of the Accusation and the Stipulation
2 effectuating the revocation and probation in case number AC-93-11
3 are attached as Exhibit A and incorporated herein by reference.

4 The expiration date on respondent's current license is
5 November 1, 1996.

6 3. Business and Professions Code ("Code") section
7 118(b) provides in pertinent part that the expiration of a
8 license issued by a board shall not, during any period in which
9 it may be renewed, restored, reissued or reinstated, deprive the
10 Board of its authority to institute or continue a disciplinary
11 proceeding against the licensee upon any ground provided by law
12 or to enter an order suspending or revoking a license or
13 otherwise taking disciplinary action against the licensee under
14 any such grounds.

15 4. Code section 5107 provides in pertinent part that
16 the Board may recover the reasonable costs of investigation and
17 prosecution of this case in the event that respondent is found to
18 have engaged in unprofessional conduct as alleged.

19 The Board has incurred reasonable costs in
20 investigating and prosecuting this case against respondent, the
21 exact amount of which can not be known until immediately prior to
22 the commencement of the hearing for this case. The amount and
23 proof of such costs will be provided at, or immediately prior to,
24 the hearing, pursuant to Code section 5107.

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1 impermissible practice while his license was suspended.

2 9. Respondent engaged in unprofessional conduct as
3 defined in Code sections 5100(c), (e), and/or (i), and Regulation
4 63, in that on or about April 18, 1994, respondent failed to
5 disclose to a potential client that his license to practice
6 public accountancy was at that time suspended. Respondent
7 knowingly, intentionally and/or dishonestly provided false and/or
8 misleading information to the potential client. Respondent made
9 it appear that he was then currently licensed to practice public
10 accountancy in this State, when he knew, or should have known,
11 that he was not then licensed to do so.

12 10. Respondent engaged in unprofessional conduct as
13 defined in Code sections 5100(c), (e), and/or (i), and Regulation
14 63, in that on or about April 18, 1994, respondent provided
15 false, dishonest, fraudulent and/or misleading information to a
16 potential client regarding an illegal tax strategy.

17 Respondent knew, or should have known, that the
18 information he provided was false, dishonest, fraudulent and/or
19 misleading. The information he provided regarding the illegal
20 tax strategy was the same type of information he previously
21 provided to clients. Such prior conduct was a basis for the
22 revocation and subsequent probation of respondent's license in
23 case number AC-93-11, a copy of which is attached as Exhibit A
24 and incorporated herein by reference.

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1 K. ETHICS COURSE AND EXAMINATION. Respondent
2 shall take and pass a Board approved ethics course and
3 examination. The exam shall be passed prior to
4 December 1, 1994.

5 If respondent fails to pass said examination within the
6 time period provided or within two attempts, respondent
7 shall so notify the Board and shall cease practice
8 until respondent takes and successfully passes said
9 exam, has submitted proof of same to the Board, and has
10 been notified by the Board that he/she may resume
11 practice. Failure to pass the required examination no
12 later than 100 days prior to the termination of
13 probation shall constitute a violation of probation.

14 L. REIMBURSE THE BOARD FOR INVESTIGATION &
15 PROSECUTION COSTS. Respondent shall reimburse the
16 Board \$5,000.00 for its investigation and prosecution
17 costs. The payment shall be made in thirty (30) equal
18 monthly installments, the first installment to commence
19 in thirty (30) days of the effective date of this Board
20 decision. ...

21 N. CPE COURSES. Respondent shall take and
22 complete 80 hours of CPE courses as directed by the
23 Administrative Committee, to be completed by October
24 31, 1994. These courses are in addition to the
25 continuing education hours required for license
26 renewal."

27 13. Respondent's probation is subject to revocation
28 and the stay of the revocation of his license number CPA 14669
should be dissolved and the revocation reimposed in that
respondent has violated probations as follows:

A. Respondent violated condition A. Respondent's
license was suspended for two months. The two month suspension
period was from March 24, 1994, through May 24, 1994. During
this period respondent was prohibited from engaging in any
activities for which certification as a Certified Public
Accountant or Public Accountant was required. As more fully
alleged in paragraphs 8 through 10 above and incorporated herein
by reference, respondent violated this term of probation by
practicing public accountancy in California, as defined in Code

1 section 5051.

2 B. Respondent violated condition B. As more fully
3 alleged in paragraphs 8 through 10 above and incorporated herein
4 by reference, on or about April 18, 1994, in violation of Code
5 5100(i) and Regulation 63, respondent provided information and/or
6 advertised in a manner which was false, fraudulent, or
7 misleading. Respondent continued to advertise and/or provide
8 information on the same illegal tax scheme for which his license
9 was revoked and subsequently placed on probation in case number
10 AC-93-11, a copy of which is attached as Exhibit A and
11 incorporated herein by reference.

12 C. Respondent violated condition B. Respondent's
13 license to practice public accountancy was suspended from March
14 24, 1994, through May 24, 1994. As more fully alleged in
15 paragraphs 8 through 10 above and incorporated herein by
16 reference, on or about April 18, 1994, while his licenses was
17 suspended, in violation of Code section 5050, respondent
18 practiced public accountancy in California, as defined in Code
19 section 5051.

20 D. Respondent violated condition C. Respondent
21 failed to submit to the Board quarterly reports for the quarters
22 ending on December 31, 1994, and March 31, 1995.

23 E. Respondent violated condition H. Respondent
24 failed to notify the Board in writing that he had left California
25 to reside and/or practice outside this State.

26 F. Respondent violated condition K. Respondent
27 failed to take and pass a Board approved ethics course and
28 examination as required.

1 G. Respondent violated condition K. Respondent
2 failed to notify the Board as required that he had failed to take
3 and pass a Board approved ethics course and examination by
4 December 1, 1994.

5 H. Respondent violated condition L. Respondent has
6 failed to either reimburse the Board the entire sum of \$5,000.00
7 for its investigation and prosecution costs or, alternatively,
8 make all the monthly installment payments as required. Of those
9 payments that were made, all were not made in a timely manner as
10 required by condition L.

11 I. Respondent violated condition N. Respondent
12 failed to take and complete 80 hours of continuing professional
13 education (CPE) courses as required.

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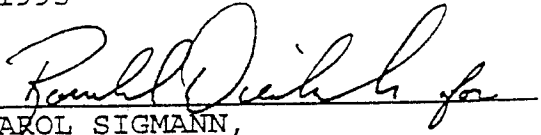
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WHEREFORE, Complainant prays that the Board hold a hearing on the matters alleged herein and following said hearing issue a decision and order:

1. Revoking license number CPA 14669 issued to Bernard Joseph Rosa, Jr.; and/or,
2. Revoking respondent's probation, dissolving the stay of the revocation of license number CPA 14669 issued to Bernard Joseph Rosa, Jr. ordered in the prior Stipulation for case number AC-93-11, and reimposing said revocation;
3. Requiring respondent to pay to the Board the balance of the \$5,000.00 for the reasonable costs of investigation and prosecution for the Accusation in case number AC-93-11, pursuant to Code section 5107;
4. Requiring respondent to pay to the Board the reasonable costs of investigation and prosecution for this matter pursuant to Code section 5107;
5. Requiring respondent to pay to the Board all costs as requested in Paragraphs 3 and 4 of this prayer, as a precondition to being eligible to petition for reinstatement of his license or reduction of the penalty imposed, or applying for a new license, pursuant to Code section 5107(j)(1); and
6. Taking such other and further action as may be deemed proper and appropriate.

DATED: June 27, 1995


CAROL SIGMANN,
Executive Officer
Board of Accountancy
Department of Consumer Affairs
State of California
Complainant

1 DANIEL E. LUNGREN, Attorney General
of the State of California
2 JOEL S. PRIMES, State Bar No. 42568
Supervising Deputy Attorney General
3 RONALD L. DIEDRICH, State Bar No. 95146
Deputy Attorney General
4 1515 K Street
P.O. Box 944255
5 Sacramento, California 94244-2550
Telephone: (916) 324-5329
6 Facsimile: (916) 324-5567

7 Attorneys for Complainant

8 BEFORE THE
BOARD OF ACCOUNTANCY
9 DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

10 In the Matter of the Petition to) No. D1-93-11
11 Revoke Probation Against:)
12 BERNARD JOSEPH ROSA, JR., CPA)
P.O. Box 10527)
13 South Lake Tahoe, CA 96158) PETITION TO
License No. CPA 14669) REVOKE PROBATION
14 Respondent.)
15)
16)

17 Carol Sigmann ("complainant"), alleges as follows:

18 1. Complainant is the Executive Officer of the Board
19 of Accountancy, Department of Consumer Affairs, State of
20 California ("Board") and files this Petition to Revoke Probation
21 in her official capacity as such and not otherwise.

22 2. Bernard Joseph Rosa, Jr. ("respondent") was issued
23 license number CPA 14669 on June 20, 1969.

24 The Board revoked said license effective March 24,
25 1994, in case number AC-93-11. However, pursuant to an agreement
26 entered into between the respondent and the Board, said revoca-
27 tion was stayed and respondent was placed on three (3) years

1 probation. Copies of the Accusation and the Stipulation
2 effectuating the revocation and probation in case number AC-93-11
3 are attached as Exhibit A and incorporated herein by reference.

4 The expiration date on respondent's current license is
5 November 1, 1994.

6 3. The final Disciplinary Order in case number
7 AC-93-11 contains the terms and conditions of respondent's
8 probation. This Order was effective on March 24, 1994. The
9 Disciplinary Order is contained within the Stipulation, a copy of
10 which is attached as Exhibit A and incorporated herein by
11 reference.

12 In relevant part, those terms and conditions include
13 the following:

14 "A. SUSPENSION. As part of probation, License
15 No. 14669 issued to respondent Bernard Joseph Rosa, Jr.
16 is suspended for two months. During this period of
17 suspension respondent shall not engage in any
activities for which certification as a Certified
Public Accountant or Public Accountant is
required. . . .

18 "H. TOLLING FOR OUT-OF-STATE PRACTICE OR
19 RESIDENCE. In the event respondent should leave
20 California to reside or practice outside this State,
21 respondent must notify the Board in writing of
the dates of departure and return. Periods of
non-California residency or practice outside the State
shall not apply to reduction of the probationary
period. . . .

22 "J. VIOLATION OF PROBATION. If respondent
23 violates probation in any respect, the Board, after
24 giving respondent notice and opportunity to be heard,
may revoke probation and carry out the disciplinary
25 order which was stayed. If an accusation or petition
to revoke probation is filed against respondent during
26 probation, the Board shall have continuing jurisdiction
until the matter is final, and the period of probation
shall be extended until the matter is final. . . .

27 ///

1 "L. REIMBURSE THE BOARD FOR INVESTIGATION &
2 PROSECUTION COSTS. Respondent shall reimburse the
3 Board \$5,000.00 for its investigation and prosecution
4 costs. The payment shall be made in thirty (30) equal
5 monthly installments, the first installment to commence
6 in thirty (30) days of the effective date of this Board
7 decision. . . ."

8 4. Respondent's probation is subject to revocation
9 and the stay of the revocation of his license number CPA 14669
10 should be dissolved and the revocation reimposed in that
11 respondent has violated probations as follows:

12 A. Respondent violated condition A. The two month
13 suspension period was from March 24, 1994, through May 24, 1994.
14 During this period respondent was prohibited from engaging in any
15 activities for which certification as a Certified Public
16 Accountant or Public Accountant was required. Respondent
17 violated this term of probation by practicing public accountancy
18 in California, as defined in Business and Professions Code
19 ("Code") section 5051.

20 B. Respondent violated condition H. Respondent
21 failed to notify the Board in writing that he left California to
22 reside and/or practice outside this State.

23 C. Respondent violated condition I. Respondent has
24 failed to either reimburse the Board the entire sum of \$5,000.00
25 for its investigation and prosecution costs or, alternatively,
26 make all the monthly installment payments as required. Of those
27 payments that were made, all were not made in a timely manner as
28 required by condition I.

29 5. Code section 118, subdivision (b), Code provides,
30 in pertinent part, that the expiration of a license issued by a

1 board shall not, during any period in which it may be renewed,
2 restored, reissued or reinstated, deprive the Board of its
3 authority to institute or continue a disciplinary proceeding
4 against the licensee upon any ground provided by law or to enter
5 an order suspending or revoking a license or otherwise taking
6 disciplinary action against the licensee under any such grounds.

7 WHEREFORE, Complainant prays that the Board hold a
8 hearing on the matters alleged herein and following said hearing
9 issue a decision and order:

10 1. Revoking respondent's probation, dissolving the
11 stay of the revocation of license number CPA 14669 issued to
12 Bernard Joseph Rosa, Jr. ordered in the prior Stipulation for
13 case number AC-93-11, and reimposing said revocation;

14 2. Requiring respondent to pay to the Board the
15 balance of the \$5,000.00 for the reasonable costs of
16 investigation and prosecution for the Accusation in case number
17 AC-93-11, pursuant to Code section 5107;

18 3. Requiring respondent to pay to the Board all
19 reasonable costs of investigation and prosecution for this
20 matter pursuant to Code section 5107;


21 4. Requiring respondent to pay to the Board all costs
22 as requested in Paragraphs 2 and 3 of this prayer, as a
23 precondition to being eligible to petition for reinstatement of
24 his license or reduction of the penalty imposed, or applying for
25 a new license, pursuant to Code section 5107(j)(1), and

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5. Taking such other and further action as may be deemed proper and appropriate.

DATED: September 15, 1994


CAROL SIGMANN,
Executive Officer
Board of Accountancy
Department of Consumer Affairs
State of California

Complainant